



Staff Report

File #: 22-162

Version: 1

Date: 4/25/2022

Item #: 4.d.

TO: Mayor and City Council

THROUGH: Kristin Retherford, Interim City Manager

FROM: Norman Wright, Community Development Director

SUBJECT:

City Council review of an appeal filed by the applicant following the Hearings Officer's denial of a Conditional Use Permit, Class 3 Site Plan Review, Class 2 Adjustment, Class 2 Driveway Approach Permit and Class 1 Design Review Case No. CU-SPR-ADJ-DAP-DR21-05 for property located at the 4900 Block of State Street.

Ward(s): 6

Councilor(s): Hoy

Neighborhood(s): East Lancaster Neighborhood Association

Result Area(s): Welcoming and Livable Community

SUMMARY:

The Hearings Officer denied a request to develop a new twenty-six building multi-family residential apartment complex containing a total of 291-dwelling units for property located at the 4900 Block of State Street (Attachment 1). City Council will decide to affirm, modify, or reverse the decision of the Hearings Officer denying the consolidated application.

ISSUE:

Shall the City Council affirm, modify, or reverse the Hearings Officer's decision denying Conditional Use Permit, Class 3 Site Plan Review, Class 2 Adjustment, Class 2 Driveway Approach Permit and Class 1 Design Review Case No. CU-SPR-ADJ-DAP-DR21-05.

RECOMMENDATION:

Affirm the Hearings Officer's decision denying Conditional Use Permit, Class 3 Site Plan Review, Class 2 Adjustment, Class 2 Driveway Approach Permit and Class 1 Design Review Case No. CU-SPR-ADJ-DAP-DR21-05.

FACTS AND FINDINGS:

Procedural Findings:

1. Summary of Record:

The following items are submitted to the record and are available: 1) All materials and testimony submitted by the applicant, including any applicable professional studies such as traffic impact analysis, geologic assessments, stormwater reports, and; 2) materials, testimony, and comments from public agencies, City Departments, neighborhood associations, and the public. All application materials are available on the City's online Permit Application Center at <<https://permits.cityofsalem.net> <<https://egov.cityofsalem.net/PACPortal>>. You may use the search function without registering and enter the permit number listed here: 21 117429.

2. On September 22, 2021, a Conditional Use Permit, Class 3 Site Plan Review, Class 2 Adjustment, Class 2 Driveway Approach Permit, and Class 1 Design Review consolidated application was submitted. After receiving additional information, the collective application was deemed complete for processing on December 1, 2021.
3. A public hearing was conducted on December 22, 2021. The Hearings Officer continued the public hearing to January 26, 2022 to allow for additional findings and testimony to be submitted.
4. Prior to the hearing, the applicant submitted an updated site plan and updated written response which are included in the supplemental staff report dated January 26, 2022 (Attachment 2). On January 26, 2022, the Hearings Officer conducted the continued hearing, closed the public hearing, and left the record open for additional written comments and final argument by the applicant.
5. On February 9, 2022, an open record memo (Attachment 3), including staff rebuttal testimony in response to the updated plans and findings provided by the applicant was provided to the Hearings Officer. The applicant provided final argument on February 16, 2022 (Attachment 4).
6. On March 9, 2022, the Hearings Officer issued a decision denying the collective application (Attachment 5).
7. On March 15, 2022, a timely Notice of Appeal was filed by the applicant (Attachment 6). At the March 28, 2022 regularly scheduled meeting, the City Council voted to initiate review of the appeal filed by the applicant.
8. The applicant has provided two time extensions to the 120-day state mandated decision deadline for this collective application. The first extension was granted by the applicant at the public hearing on December 22, 2021 agreeing to extend the deadline from March 31, 2022 to

May 5, 2022. The second time extension was granted by the applicant at the continued hearing on January 26, 2022 agreeing to extend the deadline by 21-days from May 5, 2022 to May 26, 2022.

Substantive Findings:

Needed Housing

The applicant argues that the collective application is for development of needed housing as defined in ORS 197.303, which is exempt from criteria that are not "clear and objective," as set forth in ORS 197.307(4). The applicant asserts that the Conditional Use Permit approval criteria set out in SRC 240.005(d) are not clear and objective, and therefore are not enforceable against this application. The Hearings Officer disagreed with the applicant's assertion for the following reasons:

- 1) The subject property is designated commercial under the Salem Area Comprehensive Plan and is zoned CR (Retail Commercial). This zone does not allow residential use as an outright permitted use. ORS 197.303(1) defines needed housing as "all housing on land zoned for residential use or mixed residential and commercial use." The subject property is not zoned for residential use or mixed residential and commercial use, and the zoning would not permit residential uses unless and until the Conditional Use Permit at issue was granted.
- 2) The Hearings Officer concluded that a LUBA case cited by the applicant in *Legacy Development v. City of the Dalles*, OR LUBA (LUBA 2020-099, February 24, 2021) is not applicable to this decision as the property in *Legacy Development* was zoned in a way that permitted residential uses outright. Here, residential uses are not permitted outright.
- 3) Even if ORS 197.307(4) applies in this situation, the Hearings Officer finds that the applicable criteria applicable to approval of a Conditional Use Permit are clear and objective because the criteria set forth in SRC 240.005(d) are bound by the standards within the SRC.

Based on these findings, the Hearings Officer concluded the criteria set forth in SRC 240.005(d) for a Conditional Use Permit are applicable to this application.

Conditional Use Permit

The purpose of the conditional use permit process is to allow uses that are similar to other uses permitted outright in a zone but because of the manner in which the use may be conducted, or the land and buildings developed for the use, review is required to determine whether the imposition of conditions is necessary to minimize the negative impacts on uses in the surrounding area.

The Hearings Officer found that the proposed multi-family residential use in this case does not minimize impacts and is not compatible with surrounding area for the following reasons:

- 1) The subject property was rezoned to CR (Retail Commercial) with surrounding properties rezoned to a combination of residential zones in conjunction with a voter-approved annexation in 2011 (ANXC-689). At the time of annexation, the proposed rezoning for the commercial area was approximately 19 acres in size, which was added in order to address both a documented deficit of commercial land in the city and in order to provide land for commercial services in the surrounding area. The nearest commercially zoned property is approximately one mile to the west, located at Lancaster Drive NE. There are no other commercially zoned properties located within roughly one mile of the subject property to serve the surrounding residentially zoned area.

Of the approximately 19 acres of commercially zoned property originally approved by the voters, a future City Park will occur on approximately 6.25 acres of commercially zoned land, and this proposed multi-family use would occupy approximately 10.77 acres, leaving only 1.23 acres (less than 7 percent) of the land originally envisioned for providing commercial services to a largely residential area available for actual commercial development.

The Hearings Officer notes that approving the proposed multi-family use would result in a reduction of available land for commercial uses to serve the immediate neighboring area, and that there are no conditions that could be placed on this development to mitigate this negative impact.

- 2) The Conceptual Plan from Annexation ANXC-689 shows that the subject property is in an area that was intended to be developed for commercial uses. SRC 260.090(a) states that:

Development of property shall be in substantial conformance with any conceptual plan approved under SRC 260.035. For the purposes of this section, development is in substantial conformance with a conceptual plan if the development:

- a) Is consistent with the character and intent of the conceptual plan;
- b) The impacts from the development, including, but not limited to, noise, vibration, dust, odor, or fumes, detectable at the property line will not exceed the maximums typical for the categories of uses proposed in the conceptual plan;
- c) The number and types of vehicular trips to and from the site will not exceed the maximums typical for the categories of uses proposed in the conceptual plan; and
- d) That the amount and types of outside storage, loading, and parking will not exceed the maximums typical for the categories of uses proposed in the conceptual plan.

The Hearings Officer concluded that the proposed multi-family residential use is not consistent with the character or intent of the conceptual plan, which intended the subject property to maintain its commercial use, and therefore the proposal is not in substantial conformance with the conceptual plan. Conformance with the conceptual plan is not a criterion that the applicant must meet to receive a conditional use permit, however, SRC 260.090 is particularly relevant in this case because it involves the ability to develop property that does not otherwise conform to the underlying conceptual plan.

- 3) The proposed site plan provided by the applicant indicates that future development of a gasoline service station and convenience will occur immediately adjacent to the proposed multi-family use. While the plans provided by the applicant comply with minimum setback and screening requirements of the zoning code, the Hearings Officer did not find sufficient evidence to support a finding that the fencing and landscaping would provide sufficient protection for the residents on the upper floors of the proposed buildings from lights, odors, or sounds that are generated from a gasoline service station use. Therefore, the Hearings Officer concluded that the proposal does not protect residential areas as specified in the Salem Area Comprehensive Plan, Urban Area Goals and Policies for residential development.

Site Plan Review, Adjustments, Driveway Approach Permit, and Design Review

The Hearings Officer generally found the applications for Class 3 Site Plan Review, Class 2 Adjustment, Class 2 Driveway Approach Permit, and Class 1 Design Review to be in conformance with applicable criteria and development standards of the Salem Revised Code as proposed, or with the inclusion of conditions of approval. However, because the Hearings Officer denied the Conditional Use Permit that is needed to allow the proposed multi-family residential use for the subject property, these other applications submitted collectively were also denied. Additionally, a City park is planned on 6.25 acres of the property.

Notice of Appeal

On March 15, the applicant filed timely notice of appeal. The notice of appeal states that the reasons for appeal are described in letters previously submitted dated January 26, February 9, and February 16, 2022. The applicant's statements were submitted into the record and weighed by the Hearings Officer in determining this case. No additional argument has been raised by the appellant at this time.

BACKGROUND:

The subject property is part of the former Pictsweet mushroom growing operation, which was annexed into the City in 2011 (ANXC-689) as part of a larger 120 acre development site. The East Park Estates Planned Unit Development is currently under construction and includes 659 single family units and a 36-unit multi-family residential use, for a total of 695 units. Additionally, a future City park is planned on 6.25 acres of the property.

ALTERNATIVES:

The City Council may affirm, amend, or reverse the decision of the Hearings Officer denying Conditional Use Permit, Class 3 Site Plan Review, Class 2 Adjustment, Class 2 Driveway Approach Permit and Class 1 Design Review Case No. CU-SPR-ADJ-DAP-DR21-05.

- I. AFFIRM the decision;
- II. MODIFY the decision; or

III. REVERSE the decision.

Aaron Panko
Planner III

Attachments:

1. Vicinity Map
2. Supplemental Staff Report to Hearings Officer dated January 26, 2022
3. Open Record Memo to Hearings Officer dated February 9, 2022
4. Applicant's final argument dated February 16, 2022
5. Hearings Officer's decision dated March 9, 2022
6. Notice of Appeal dated March 15, 2022